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REMARKS

On the REVEREND

Dr STEBBING's Dissertation

ON THE

POWER of STATES

To deny Civil Protection to the

MARRIAGES of MINORS, &c.

By Nathaniel Foster



L O N D O N :

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REMARKS

ON

The Rev. Dr STEBBING's Dissertation on the Power of States to deny Civil Protection to the Marriages of Minors, &c.

THE Sentiments and Feelings of the bulk of Mankind having been at all Times so widely different with regard to numberless Particulars relative to the Marriage State, it was quite natural to expect, that a great Variety of Prejudices would be entertained against any Act which the Legislature could *possibly* frame on that complicated Subject. And in proportion as such a Law either contained new Restraints, or added fresh Vigour to those already in being, it could not fail of provoking the Exceptions of those who are either peculiarly tender on this Head, or who from an unbounded Passion for Liberty, are immoderately jealous of all new Restraints whatsoever. It is no Wonder therefore, that on these and other accounts, a great Number of alarm-

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ing Consequences have been studiously drawn from this Act. But as it contains nothing material that is not abundantly warranted by the Opinions of the ablest Writers on Government, and the Practice of the wisest States, a little Time and Experience will, it is to be hoped, afford an ample Confutation of all these dreadful Apprehensions.

BUT an Author of some Note has attacked this Law from another Quarter. The Legislative Power is arraigned, as having exceeded the Commission with which it was originally invested. Nor has *Civil* Society, it seems, any Right to withhold it's *Civil* Confirmation, and the *Civil* Consequences of it, from *Marriage Contracts* made by Minors without Consent of Parents or Guardians; though it is on all hands agreed, that it justly with-holds the like *Civil* Confirmation from *all other* Contracts whatever entered into by Persons in the like Circumstances.

THE Charge is heavy, the Position somewhat extraordinary. It will not therefore be amiss to examine into the supposed Foundation of it.

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THE Question, as stated by the Author, is concerning the Power of States to deny Civil *Protection* to the Marriage Contracts abovementioned. And the State is then said to *protect* Marriage Contracts, when it enforces by Civil Sanctions *every* Obligation which *naturally* [or in a State of Nature] arises from them *. After a brief Enumeration of the principal of which we are told, that 'these are the Rights which Society *is to* support †.' But is Civil Society, even in such Marriages as it protects, *absolutely* and *simply* engaged to support *every* Right and Obligation that *naturally* arises from them? Has it not rather a discretionary Power with regard to several of these Particulars? Have not the wisest Law-givers, in adjusting the Civil State both of the contracting Parties, and their Issue, justly placed them, in consequence of some political Considerations, in a Situation very different from that, which, abstracting from such Considerations, right Reason would have marked out for them? Thus, for instance, the Author himself lays it down as a Maxim of the Law of Nature, 'That the Issue are entitled to the Substance of their Parents, when dead, against all Strangers, except so far forth as they may stand

* p. 1.

† p. 2.

‘ excluded by some Act of the Parents themselves *.’ And yet few civilized Nations, in settling the Succession to Inheritances, have thought themselves necessarily obliged to adhere strictly to this Maxim. Witness the civil Rights of Primogeniture, Entails, Exclusion of Females, &c. in which both the natural Power of the Parents to dispose of their Substance, and the common Right of their Issue jointly to succeed to it, have in some Degree been evidently superseded by almost all Governments, for Reasons arising solely from their respective Genius and Constitution. This is remarked merely to remind the Reader, that Civil Society is confessedly invested with a general Power of cancelling several of the principal Rights and Obligations which obtain in a State of Nature; and because this it’s Power of altering and destroying some of the most important Consequences originally resulting from such Marriage Contracts as it protects, strongly argues a like Power of with-holding entirely it’s Civil Sanctions from those which it disapproves. Nor can the Exercise of this Power, as long as it is confined to the *same* Circumstances, in which on the *same* Principles it with-holds it’s Civil Sanctions from all

other Contracts, fairly be deemed arbitrary or unreasonable.

BUT we are at present concerned to examine the Arguments which are brought to the contrary. And first, we are amused with a long Disquisition for several Pages together *, ‘ Whether the Dissent of the Parent is an [absolute and universal] Bar against the Child’s Marriage, (supposing him otherwise qualified) either by the Law of Nature, or the positive Law of God.’ But both these Points may very safely be waved without any real Injury to the Claim of Civil Society; as this Writer himself is pleased to allow †, that the Parent has in these Cases a discretionary Power of disinheriting the Child and his Issue, *i. e.* of cutting them off from all future Connexion with his Family; or, in other Words, of with-holding all the *Family* Consequences that would otherwise naturally arise from such Marriage. For by Parity of Reason it seems evident, that *Civil* Society is invested in like manner with an inherent Right of with-holding all it’s *Civil* Consequences from such Marriages as are disapproved by it. The Power indeed here claimed by Civil Society is, in some respects, more *extensive* than that by the Parent.

* p. 5—24.

† p. 17.

But it is so in numberless other Cases. The very Nature of Civil Society requires indeed that it should be so. And it is moreover certain, that in all Countries where the natural Power of the Parent is frequently superseded by civil Settlements, Entails, &c. and where that exercised by the State is confined solely to those who are incapable of all other Civil Contracts, and is likewise softened by some alleviating Circumstances, even with regard to Them; it is, I say, certain, that a Power thus supported and limited in the State, is on the whole far more *unexceptionable*, than the abovementioned *indefinite* and *discretionary* one of the Parent.

BUT though the Question concerning the *original* Right of the Parent *absolutely* to annul in all Cases the Marriage Contract by his Dissent, is quite foreign to the Point in Dispute; there are however some Things advanced on this Occasion, and previously to it, which, as they may tend to mislead us, seem to require some Animadversion.

FIRST, in speaking of the Degree of Knowledge essential to the Marriage Contract, He observes, that not even 'every ' *considerable* Degree of Weakness in the
' Under-

' Understanding disqualifies a *Man* to marry. If he has Sense enough to know what he binds himself to, it is sufficient. ' The same Thing may be said of *Children* *.' If this Observation is strictly confined to what in a State of *Nature* is essential to the Marriage Contract, it is not perhaps of any moment to dispute the Truth of it. But the two Cases, when considered with a View to the Power of Civil Society (against the Foundation of which they are tacitly levelled) are apparently different. For is a Defect which a little Time and Experience will probably remove, to be treated by the Legislature exactly in the same manner with one which it has Reason to look upon as incurable? Is the *temporary Suspension* of a Right the same Thing with an *entire Abolition* of it? Has not the Parent even in the State of Nature plainly a greater Degree of discretionary Power in one Case, than in the other? Are not therefore the same Reflections equally applicable to Civil Society? And may it not, for a few Years, from Reasons of public Utility, refuse to authorize the blind and rash Impetuosity of Children, hurried on, as is frequently the Case, by indirect Practices, without condemning to perpetual Celibacy those who, even in their most

perfect State, labour under a considerable Degree of Weakness in their Understanding?

BUT we are soon after informed, that if it should be declared [by any Law] that no Persons shall be adjudged capable of contracting Marriage 'till they are upwards of twenty [Years of Age] it would be very unreasonable; for Nature may urge to Marriage sooner *.' Provided this Assertion be strictly understood in it's most confined Sense, as condemning only such Laws as are declaratory of a *natural Incapacity*, and which contain an *absolute* Prohibition, we have little or nothing to do with it. But let not the supposed Unreasonableness of such a Law, insensibly create a no less unreasonable Prejudice against another of a quite different Nature; against a Law that is expressly founded only on Maxims of *civil* Prudence, that with-holds only *civil* Confirmation, and with-holds this it's *civil* Confirmation, not *absolutely*, but only as directed by the Judgment of those who are apt to be the most tenderly affected, both by the present Wants and future Welfare of the Persons concerned.

* P. 5.

BUT

BUT ' Nature, it is said, may urge to
 ' Marriage sooner than the Time prescri-
 ' bed.' And the learned Writer, in a
 former Treatise asserts, that ' the Right
 ' to contract, either now or a Year or
 ' two Years hence, he [the Child] *cannot*
 ' give up to Society, nor can he lay him-
 ' self under any Conditions that are sub-
 ' versive of that Right, (as the Consent of
 ' Parents may be) because he has it not in
 ' himself to dispose of, as he will stand
 ' bound by the Law of God, if he has
 ' not the Gift of Continency, to have re-
 ' course to Marriage, as the proper Re-
 ' medy *.'

THAT the Right of contracting Mar-
 riage is so far unalienably vested in every
 particular Person, that when he is arrived at
 (what, in the Society of which he is a Mem-
 ber, is considered as) the Age of Discretion,
 he can never fairly be presumed to have ab-
 solutely given it up to the State, will not be
 disputed. But a supposed general Acquies-
 cence in a *temporary and conditional Sus-
 pension* of the Exercise of this Right for a
 Year or two, before the Person is deemed
 fully capable of judging in what manner it
 will be most conducive to his own future
 Happiness, to exert it, in a Contract which

* Enquiry, p. 20.

may

may nearly affect him for his whole Life; this surely is an Affair of a very different Nature. And to deny that the State is invested with a limited Power of with-holding it's Civil Confirmation in the *one* Case, appears to be no less extravagant, than to suppose it perfectly at Liberty to act as it pleases in the *other*.

FOR is the mere guarding against any *possible present* Danger of Fornication, the sole End of the Marriage Contract, in a well ordered Commonwealth? Or is every other social and civil Consideration; though of the most *general* Nature, to be at all Times sacrificed to the *mere Apprehension* of this Evil, perhaps in some very *few* particular Instances? Nay, allowing this single Consideration it's utmost Weight, is not the *future* Danger of it to be guarded against (in a general View of Things) as well as the *present*? Is not indeed the future Evil of this Kind thus to be guarded against, both greater in itself, and more pernicious to Society? And is not every Regulation, which is properly calculated to prevent notorious Indiscretion, Thoughtlessness, and Fraud, in Marriage Contracts, in effect, a salutary Provision against the Danger of this greater Evil?

BUT

BUT if the *present* Danger alone is to be considered, if, because Nature may possibly *urge* to Marriage sooner, no one can lay himself under *any* Conditions, that for any given Time are subversive of the Right of contracting Marriage, let us take a short View of the Consequences of this new and extraordinary Doctrine. Not only the late unnatural Act, but every preceding Regulation, that in any Degree *retards* the Marriages of Minors, or others, or lays any Difficulties in their Way, ought instantly to be repealed. Instead of punishing such Ministers, as for the Sake of greater Expedition may be guilty of some Irregularities, Provision should immediately be made, that a competent Number of them be always ready on the shortest Notice. The Moment a Person thinks it clear that the other contracting Party has been guilty of Adultery, he should at once be empowered to summon a Jury of Neighbours on the occasion, instantly, and without Appeal, to determine the Affair, instead of waiting for the tedious Delays of a regular Process. For Nature may urge to a *second* Marriage, as well as to a *first*, sooner. No single Person must likewise for the future, presume to undertake any long Voyage at Sea, it being in many Cases impossible for him

to

to do so, without *laying himself under Conditions*, which, during it's Continuance, *are subversive, not only of his unalienable Right*, but of his *natural Power* of contracting Marriage. And if any married Person should, though for the most important Reasons, think himself at Liberty to take such a Voyage; or should even languish at home, under a lingering, and seemingly incurable Disease, the other Party, on Supposition of the abovementioned *unalienable Right*, if it has not the Gift of Continency, which may be as much wanting *here* as in the *other* Instance, neither is, nor can be, under Bondage in such Cases. It must, on the Principles laid down by this Writer, be as much presumed to lie under a *natural* Obligation (which no general Expressions in a subsequent Revelation can destroy) of reserving it's original Liberty in all such Cases, on it's Entrance into the Marriage Contract, as the unmarried Minor on his Entrance into Society, can possibly be in the Affair in which he is conceived to be concerned.

BUT after all, can it fairly be said, that this supposed Case of Necessity is *entirely overlooked* by the late Act? Must it not be presumed to have recommended *this*, as well as other Considerations, to the Attention

tion of those who are more immediately concerned with the Execution of it? Has it any where declared, that when Parents or Guardians are *really* wanting to their Duty in this Particular, the most irregular Marriages of Minors, if thus absolutely necessary, are not obligatory *in foro conscientiae*? By no means. It has merely refused, in a *general* and *civil* View of Things, to consider this as an excepted Case? And has not every preceding Regulation, on the same Subject, done exactly the same Thing in proportion to the Extent of it? And must not every future Law, as far as it contains any general Restraint on the Marriages of Minors, proceed on the same Principles; unless indeed it chos'es to defeat it's own Purpose, by admitting an Exception, which, for one Case in which it is real, may be pretended in a thousand.

BUT to proceed, the learned Writer has proved at large, from *Grotius* and *Puffendorf*, that Parents have not, by the Law of Nature, a decisive Authority over the Marriages of their Children, when supposed to be arrived at the Age of Discretion; I say, when they are arrived at the Age of Discretion. For both these great Lawyers, even in the Passages quoted by Him, have
taken

taken particular Care not to weaken the Parental Authority, antecedently to that supposed Period *. This Truth therefore, thus limited, will not be disputed. But we cannot so readily jump at once to the hasty Conclusion, ' That [without any
' sort of Distinction of Times or Seasons]
' the Parent, by the Law of Nature, ne-
' ver can forbid or annul the Marriage of
' his Child, by his Dissent †.' As there-
fore neither *Grotius* nor *Puffendorf* afford the least Countenance to this extraordinary Assertion, we must look for the Foundation of it in the Remarks occasionally intermixed with the Passages quoted from them.

AND first He observes, that during the Period that *Grotius* styles *tempus imperfecti judicii* ‡, (which He loosely calls the Time in which the Child hath not *Understanding sufficient to discern between Good and Evil* ||) Nature herself will not permit a Child to marry. There is, perhaps, no one Observation on Human Nature, to which I should more willingly assent, provided that Nature herself would but *permit* me to do so. For it lays a good Foundation for vindicating Mankind from an injurious Asper- sion too frequently thrown on it by Philoso-

* p. 7, 14, 15. † p. 19. ‡ p. 7. || p. 9.
phers,

phers in all Ages, who have constantly lamented the early Growth and Strength of all our natural Passions, and the late Arrival of a sufficient Degree of Reason and Prudence to direct them. 'Till, however, the Reality of this valuable Discovery can be more fully ascertained, it may not be amiss to ask the Author of it, whether that Nature, which just before was represented as so extremely *urgent* in the Affair of Marriage, is the same with this, that will *not permit* it, till the Person has attained to the Age of Discretion.

BE this however as it will, He is certain, that ' it is impossible to settle, by ' any general Rules, when this Maturity ' of Understanding comes; for it comes ' in some sooner, in others later *.' Undoubtedly it does. And for *this very Reason* the Parent, or Head of the Family, must be considered as being ordinarily (when in a State of Nature) the proper Person to determine according to the best of his Judgment, in each particular Case concerning it's Arrival. No Authority can, however, it seems, accrue from hence to Civil Society. The Affair is incapable of being settled by *any general* Rules. It cannot therefore fall under the Cognizance

* p. 10.

of any Legislature. And if, indeed, by it's being incapable of *being settled by general Rules*, it is meant, that no such Rules can be laid down, as with an equal Degree of Exactness shall be precisely applicable to each particular Case, this, it must be owned, has always been, not only in this, but in a thousand other Instances, the grand *Desideratum* of Human Policy. Nay, as long as Government is concerned with such strange and uncertain Creatures as Men are, one may perhaps venture to pronounce that it will always be so. And yet the civilized Part of the World has gone on tolerably well, (not by leaving all such Cases at random, which would soon be attended with great Confusion, but) by prudently endeavouring to discover a proper Medium; by establishing such Rules, as, how hard soever they may seem in some *particular Instances*, appear to be *upon the whole* beneficial to Society. Nor should it be forgotten, that in the Case now before us, the Legislature has been more particularly tender of the supposed Privileges of Minors, than it is in most other Contracts. It has laid down no *absolutely* general Rule on the Occasion. The same short-liv'd, discretionary Negative, with which the Parent and Guardian were before considered as invested, is barely continued to them. But
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the former *Civil* Sanctions were found ineffectual. It was therefore high Time to substitute others of the like *Civil* Nature, the Force of which could not so easily be eluded.

BUT, according to this Writer's Observation, the Maturity of Understanding we are concerned with 'commonly comes 'far within the Period which most Nations assign to the Age of Minority *.' How far this is the Case in other Countries, they alone are to consider. It is however some Comfort as well as Credit to all good Englishmen, that the Supreme Authority here is far from thinking so hardly of Us, as that of a great neighbouring Kingdom † does even of the quick Parts and lively Genius of it's Subjects. And if any Regard is to be paid to vulgar Notions, the general Complaint here has usually been, not that Children are too much or too long harrassed by unnecessary Restraints, but that they are more frequently too little inured to such as are proper, and too soon released from them. And this, one would imagine, is the *Extreme* to which a free People is most likely to incline. Nor are there even wanting,

* p. 10.

† In *France*, Sons are not allowed marry without Consent 'till 30, and Daughters not 'till 25.

in this very State of Things, some Appearances that may deceive a Person into a contrary Opinion. For Children are excellent Mimics, and commonly very fond of assuming ^{the} Man. Whenever therefore they are particularly encouraged to do so, they often act the Part so well, that a Spectator may easily mistake the *Appearance* for a *Reality*.

BUT He has the Authority of *Grotius* * for this Assertion, That there *may be* a Degree of Knowledge sufficient to bring a Person under the Force of moral Obligation within the Age of Minority. Undoubtedly there *may be*. But on what are *Civil Regulations*, when calculated to prevent Fraud or Folly, principally founded? Not on *mere Possibilities*, but on apparent *Probabilities*.

' NAY, even by our own Laws, we are told, Minority is no Discharge in Cases of Felony; and every Man who marries his Daughter during her Minority, confesses her capable of moral Obligation: which is full to the Point †.' As to the Point on which the Author more immediately professes himself to be here engaged, both these Cases shall be allowed to be as

* p. 10.

† p. 12.

full to it as he pleases. Let them not however create a Prejudice against the general Point in Question, with which they have no real Connexion. 'Minority, by our own Laws, is no Discharge in Cases of Felony.' Therefore, as it should seem, not in that of Matrimony. But first it should be shewn, that no greater Degree of Understanding is requisite to guard against all Kinds of Fraud, in *positively entering* into the Marriage, or any other important Contract, than merely in *abstaining* from Theft, or Murder, and in escaping the Gallows. And it may be farther proper to observe, that Civil Society is with great Reason far more attentive to the Welfare of innocent, though perhaps thoughtless, Persons, than to that of those who discover an early Genius for disturbing the Peace of it.

'EVERY Man however, who marries his Daughter during her Minority, *confesses* her capable of moral Obligation.' He certainly appears to *confess*, that in Consequence of his Advice and Instruction, and that of her Husband, and other Friends, she is likely upon the whole to know how she ought to behave in the State into which she is inclined to enter. But (though much more to her Advantage may be true) he as

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certainly

certainly confesses nothing farther by marrying her. He confesses nothing with Regard to the Sufficiency of her Discretion, when *separated* from *his own*, and much less when *opposed* to it, to make a proper Choice for Life, or to guard against being grossly imposed on in it. Nay, many a Parent who marries his Daughter during her Minority, were his real Motives known, is perhaps very far from paying a particular Compliment in so doing, to her early or superior Prudence and Understanding.

By the Help of such Reflexions as these, the learned Writer has gone far beyond the Opinion of the two Great Lawyers, *Grotius* and *Puffendorf*; whom, though he has affected to retain on his Side, he has suffered merely to act an Under-part in the Affair. They, good Men, imagined, that they had laid a sufficient Foundation for the natural Liberty of Mankind, by emancipating Children, when their Understanding was grown *ripe* and *perfect* with Age, when they had arrived at the *full* Use of their Reason. But these cautious Restrictions frequently dwindle, when the Author is at Liberty to use his own Language, into such indeterminate Expressions as these, 'an Understanding sufficient

' cient to discern between Good and Evil *;
 ' a *Capacity* of moral Obligation †;
 which, it is to be hoped, is not always en-
 tirely wanting at ten or twelve Years of
 Age, ' the Period when the moral Faculty
 ' *shews* itself ||; ' as if this Faculty did not
 often occasionally *shew* itself long before it
 could regularly and properly be depended
 on in any Matter of Importance. And
 when by this Means the Knowledge requi-
 site to the Marriage Contract is brought so
 low, that according to this Writer, *Nature*
herself will not *permit* a Child to marry be-
 fore he arrives at it, ' the Parent, we are
 ' informed, cannot [in any Case by the
 ' Law of Nature] forbid or annul the Mar-
 ' riage of his Child, where there is nothing
 ' to hinder or impeach it, but barely the
 ' Want of his Consent.' But, is it not fre-
 quently Matter of Doubt, whether there
is or *is not* any Thing that ought to hin-
 der the Child's Marriage, besides *barely* the
 Want of the Parent's Consent? And how
 is this previous Question to be determined?
 By the superior Wisdom, Foresight, and
 tender Affection of the Parent; or by the
 raw Forwardness and fond Conceit of the
 Child; blinded, perhaps, in this very In-
 stance, by a delusive and dangerous Passion?
 The decisive Right however of contracting,

* p. 9.

† p. 12.

|| p. 13.

and consequently of determining every Thing previous to it, is, according to this Writer, necessarily inherent in the Child. And for this extraordinary Opinion, two Reasons no less extraordinary are given. First, *He*, the Child, being *himself*, is most properly *his own*, and is most concerned in *his own* Happiness *. He must therefore, it seems, be *at all Times* the most *proper Judge* of every Thing relating to it. Accordingly, the Moment he is old enough to fancy that his Parent uses any unnecessary Degree of Discipline in his Education, he is at full Liberty to run away. Nor has his Parent, in a State of Nature, any Right to restrain him from so doing. For in this Case, as well as the other, *He*, viz. *He*, being *Himself*, is most properly *his own*.

As to the other Reason assigned by the Author for the Unalienableness of this supposed decisive Right in the Child, it has been already considered. But to make this matter still clearer, let us for once suppose it a possible Case, even in a State of Nature, That in a Climate not unlike our own, a young Lady in her *Teens* should flatter herself that she is blessed with the happy Talent of reforming a Rake, and

in Consequence of the Duty incumbent on her instantly to set about so good Work, should, notwithstanding all the Difficulties laid in her Way by her more diffident Father, privately contract a Marriage with a most abandoned Profligate, and who is in several other Respects unsuitable to her, though she is most judiciously positive, that the whole Enjoyment of her future Life, depends on her spending it with her charming Convert. How is the Father, supposing her still in his Power, to behave on the Occasion? Is he, in such a Case as this, in Consequence of any solemn Enquiries into what is, or is not, in the scholastic Language, *essential* to the Capacity of entering into the Marriage Contract, instantly to give up his perhaps only or favourite Child to impending Misery and Ruin? Or, does not the plain Voice of Reason and Common Sense authorize him to annul any such supposed Contract, as wantonly entered into by a Person not yet arrived at the Age of Discretion?

AND in Case the Father should be troubled with any religious Scruples on this Occasion, the Authority of the Law of *Moses* would probably be sufficient to satisfy them. He would perhaps consider himself as invested with much the same

discretionary Power with that formally established in the twenty-second Chapter of Exodus. The following Case is there put : *If a Man entice a Maid that is not betrothed, and lie with her, he shall surely endow her to be his Wife. But if her Father utterly refuse to give her unto him, he shall pay Money according to the Dowry of Virgins.* This Passage, how unworthy soever it might appear to our Author of his Notice, evidently contains a Case in Point. Nor does it require any laboured Comment on it. The Damsel has in pretty strong Terms given her Consent. ' Nature (to ' use this Writer's Language) has not only ' permitted, but perhaps urged her to do ' so.' The Seducer is considered as having so compleatly contracted himself to her, that he is not only obliged to take her to be his Wife, but (*Deut. xxii. 29.*) *he may not put her away all his Days.* In short, not one of the *Essentials* required by the Doctor appears to be wanting. And yet such is the hard Fate of the suffering Damsel, that notwithstanding her original indefeasible and *unalienable* Right to marry when and whomsoever she pleases; and notwithstanding she has already so far exercised this her supposed *natural Right*, that not merely the Preservation of her Honour, but the Recovery of it, is concerned in supporting

porting it ; yet even in these extraordinary Circumstances, is the absolute *Negative* of an inexorable Father expressly authorized and established by the divinely inspired Law-giver of the *Jewish* State.

BUT for what Reasons, it may be asked, was the Father invested with so absolute a Negative in such delicate and extraordinary Circumstances? For very evident ones, if we attend properly to the *general Principle* on which this particular Constitution was apparently founded. The Father was undoubtedly invested with an absolute Negative in Respect of the Marriage at least of his Daughter, whilst in her Youth, and a Part of his Family. To have left her at Liberty in this particular Instance, would have been in effect to have opened a Way for entirely subverting this his Authority. It was therefore thought proper to support it, though at the Expence both of the Daughter's Honour, and the Legitimacy of the Child that might be born of her. So little Regard both to the imaginary *unalienable* Right, and supposed dreadful Consequences of infringing it, is paid even in the original Establishment of the *Jewish* Theocracy.

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NOR does the Authority of the Father in the Case before us rest merely on the Instance abovementioned. A *general Negative* with Regard to *every* Obligation which his Daughter, whilst in his House in her Youth, might in *any* Case lay herself under, is expressly conferred on him. *If a Woman* (Numb. xxx. 3, &c.) *vow a Vow unto the Lord, OR* (not AND * as it is absurdly rendered) *bind herself by a Bond, being in her Father's House in her Youth, —and her Father disallow her in the Day that he beareth, not any of her Vows, OR of her Bonds shall stand.*

NOTHING can easily be conceived to be more plainly *universal* than the Declaration here made; and yet this Writer, not only without the least Countenance from any other Passage in the *Jewish* Law, but in direct Opposition to that before quoted, thinks proper to consider the Marriage Contract as an Exception to this general Rule. For

* The Particle *necessarily* signifying OR, is used in the Verse immediately before. That here employed is alike *capable* of the same Meaning, very *frequently* so used, and ought plainly to be regulated in this Instance as to it's Sense by the preceding one. The Septuagint understood it thus. And indeed Engagements of *all* Kinds are visibly comprehended in the Rules here laid down for Things of this Nature.

FIRST,

' FIRST, Marriage is not a Vow unto the ' Lord *.' Certainly it is not. But is it not a *Bond*, an *Engagement*, a Source of *Obligation*? And can any one who reads this whole Passage as it stands at length, with a tolerably critical Attention, not see that the Words *Vow* and *Bond* ought not to be confounded together, but are put disjunctively, and plainly contradistinguished from each other; the first, as having God for it's immediate Object, and as being in the Eye of the *Jewish* Law an Affair of the most solemn Nature, being by way of Eminence distinctly mentioned by itself; and the latter a general Expression, evidently including all the various *Engagements* in common Life, which the Person concerned might think herself capable of entering into.

THE second Reason here assigned is quite entertaining: It precisely amounts to this. The Marriage Contract or Engagement cannot be supposed to be included in *this* Part of the Law, because it can have no Place in *another subsequent* Clause of it *expressly* relating to Women already *married*. Seriously to confute such Reasoning, is almost as injudicious as to employ it.

* p. 20, 21;

BUT

BUT thirdly, ' The Vow [or Engagement] here mentioned, concerns something ' that was *to be done during* her Continuance ' in her Father's House. But by Marriage she ' ceases to be of it.' Is not a *Fact* here advanced without the least Shadow of Proof for it? How does it appear, that a Law expressly annulling *all* her Engagements on Account of her Situation *at the Time* she enters into them, is to be restrained by an *imaginary* Limitation, not so much as hinted at, but arbitrarily drawn from the *State* in which she was to be in *Consequence* of their *Execution*? Is there not indeed something rather extravagant in the very Notion? And does not the Author himself allow the Law to take Place in a Case where she as much ceases to be of her Father's House, as in that of Matrimony, *viz.* on the Supposition of her wholly devoting herself to the Temple or Tabernacle?

BUT in her supposed devoting herself in this Manner, her Father's Property, it seems, which he had a Right to secure, was concerned. How? Because he *might*, if he pleased, redeem her. But he *might* let it alone, if he pleased. His Property therefore was just as much concerned in this Case, as in the giving or not giving her a Fortune when she married.

THESE

THESE however, and the like Declarations, ' are all spoiled (says our Author) at least for our Use, because they relate to ' Children, not of this or that *particular* ' Age, but of *all* Ages, without Distinction.' But this Fact, in Part at least, is evidently false. The *Jewish* Daughter abovementioned is represented as not only being in her Father's House, *but in her Youth*. And such a Description in a *Civil Law*, *general* as it may seem to us, was probably as *determinate* in it's Signification, or nearly so among the *Jews*, as the Word *Minority*, or any other like Expression, is with us. It is moreover evident from the Passage in *Exodus*, that the Negative of the Father, with Regard to his Daughter's Marriage, subsisted at and after the Time in which Nature not only permitted, but seems to have urged her to it. In what Sense then are these Passages *spoiled* for our Use? The two *Jewish* Constitutions abovementioned, when fairly compared together, prove, I think, *demonstratively*, all we want of them. They prove, that as long as the Daughter was considered as being under the Care of her Father, he was by the Law of *Moses* invested with an absolute *negative* and *annulling* Power over all her Engagements of what Kind soever. They prove that this his Negative directly extended

tended itself to the Marriage Contract, even in Circumstances of the most delicate Nature. They prove him likewise to have been at Liberty in these Circumstances to bastardize the Issue of his offending Daughter. They prove therefore the *unalienable decisive* Right of marrying, supposed by this Writer to be inherent in the Child the moment it is *naturally capable* of so doing, to be a mere Fiction and Chimæra. And they prove lastly, that there can be no Objection drawn from the Law of Nature, sufficient to prevent any *Civil* Legislature from imitating, as far it thinks proper, in a *civil* Case, the general Example here afforded it by the divinely authorized Law-giver of the *Jewish* Nation.

UPON the whole, how difficult or rather impossible soever it may be, to ascertain exactly, in a State of Nature, the precise Boundaries of Right between the Parent and his Children, not only on this, but on various other Occasions, it must, I think, be acknowledged, that even in this simple and loose State of Things, he is entrusted with a temporary, indeterminate, and discretionary Negative in the Marriage, as well as in all other important Contracts of his Children, as long as he is seriously and *bona fide* satisfied, that they are not yet arrived

rived at the Age of Discretion. And, as the Methods by which this his Authority may be invaded, are principally of two Kinds, Nature seems to have armed him with a proper Degree of Power to oppose to each of them. If any one of his Children, without being inveigled from abroad, thro' mere wilful Stubbornness rebels against him in this Particular, the Parent (not merely for the idle Reason, that he may do as he pleases with his own, but) as a just Punishment for his Offence, may not only banish *him* from all future Intercourse and Concerns with his Family, but may likewise undoubtedly so far *annul* the *Act* itself, as not to consider the *Issue* arising from it as bearing any real Relation to him. On the other Hand, if the Parent is convinced that his Child has been led away more from Weakness than Wilfulness, that it has been seduced by unfair Methods, that it has been during it's supposed Non-age drawn into a Marriage Contract, which must apparently be attended with inevitable Ruin and Misery; (as in it's being joined to an abandoned and desperately profligate Character of either Sex) it is, I say, evident, even to Common Sense, that the Parent proceeding honestly on his own personal Conviction of the Truth of these Facts, may fairly consider himself as the proper Judge
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of the Affair, may *absolutely* and to all Intents and Purposes *annul* by his *Dissent* any such supposed Marriage Contract, may look on his Child as still under his Guardianship, and lawfully oppose Force to Force, if any Attempt is made to rescue it out of his Hands.

BUT if this holds good in any *one* Instance, (which the Law of *Moses*, as has been proved, plainly supposes to do so in *several*) what becomes of our Author's imaginary decisive and invariably inherent Right in the Child, founded, as He conceives, on a peremptory Declaration of the Law of Nature? For it is the Misfortune of *all* such high Claims founded on scholastic Notions of *Essentials* and *Universalties*, that if they can in any one Instance be successfully attacked by Maxims of common Reason and Prudence, they vanish at once entirely into the ideal World, from which they were taken.

'TILL therefore this Writer has rallied these his fleeting Forces, and has moreover routed the *Jewish* Theocracy in his Passage, we need not be in any great Pain about supporting the Right of Civil Society to interpose on this Occasion. For we are not, as he seems to think, at all concerned to enquire

enquire ' Whether Society can give to
 ' Parents a Right which neither God nor
 ' Nature has given them.' Not that in-
 deed we have any Reason to be alarmed
 even at this formidable Question. For no-
 thing can be more evident, than that Civil
 Society perpetually confers various Rights
 on Persons, which neither God nor Nature
 had antecedently given them. But the
 sole Point with us at present is, Whether
 Civil Society cannot confer a *fixed* and *de-*
terminate Right, where even Nature her-
 self must be supposed to have bestowed a
variable and *indeterminate* one; and where
 even God himself, in the only Civil So-
 ciety in which He has interposed, has af-
 forded a Precedent for so doing.

Now whoever takes the most superficial
 View of the first Principles of Civil Policy,
 cannot but at once perceive, that it is im-
 mediately concerned to settle, as much as
 may be, by some general Laws, all those
 variable and indeterminate Rights, which
 Persons, when in a State of Nature, might
 plausibly contest with each other. And it
 is to be observed moreover, that Civil So-
 ciety manifestly enjoys, to a certain De-
 gree, a *discretionary* Power in all these
 Cases; that where two *imperfect* Rights
 concur, it may frequently perfect the one,

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and destroy the other, merely for Reasons drawn from the particular Form and Complexion of the Government established in it. Hence the Fact which this Writer seems to be displeased at has naturally arisen, ' There is no Point, says he, upon which ' States have made more different and contradictory Laws than this of Marriage *.' And that for this plain Reason; because there are few Points, in which (how clear soever this Writer may be, that his own Notions are right) the Circumstances and Consequences attending them, are less *precisely* and *necessarily* settled by the Law of Nature, than in this of Marriage. Civil Society must therefore, as well as it can, determine and enforce by *Civil* Sanctions, the principal Particulars relating to it.

LET us then conceive an imaginary civilized State deliberating in it's legislative Capacity on the Affair now before us. And here two very important, but directly opposite Pretensions at once present themselves, the Claim of the Parent to a discretionary negative Authority, and that of the Child to absolute Liberty. To say that even in a State of Nature, either of these Claims is in all Cases entirely without Foundation, is what no one Writer of

Credit on the Law of Nature has ever ventured to assert. Nor is it less obvious, that ordinarily the Presumption is in Favour of the Parent, as having the riper Judgment and longer Experience, and that his original Claim receives a great additional Degree of Strength, from the very Constitution of all those civil Societies in which a considerable Difference in Rank, Station, and Fortune, is established; and where, in Consequence of Entails, and various other Circumstances, both his natural Authority, and the natural Power by which he was enabled to support it, have been notoriously impaired. To stile the *Concern* of a Parent in higher Life for the Honour of his Family, *mere Pride*, or *Vanity*, and even a *strong Desire* in him, that his Children should set out in the World as advantageously as their Education and Circumstances will permit, *Avarice* or *blameable Ambition*, is as idle romantic Cant, as it would be to compliment the Inclination of a Beggar to a young Heiress, with the Appellation of a *natural* and *disinterested* Love for her *Person*. Nor can the Bulk of Mankind, unless devoid of all Affection for their Issue, possibly be considered as unconcerned, whether their Child is joined for Life to a Fool and a Brute, or to a Consort of tolerable Temper and Discretion; whether to a virtuous, regular,

careful, industrious Person, or to an idle, extravagant, abandoned Profligate; whether to one of suitable Rank, Education, and Improvements, or to one who in these Respects would occasion Pain and Shame to a whole Family, and after a while to that Member of it principally which had made the rash Choice. The Uneasiness felt by Parents on these Occasions may be full as *real*, as *natural*, as much deserving, to a certain Degree, the Attention of Civil Society, as that of the Child, though arising from any other supposed natural Passion whatever. In Consequence therefore of these, and other like Considerations, as well as of his being the natural Guardian of his Children, (a Trust which does not seem to *expire* the Moment *the Pupil* may think proper to *cancel* it) the Parent, not without some Foundation, lays Claim to a discretionary Negative, 'till *he himself* is satisfied, that they are really capable of judging properly for themselves. And on the other Hand, it must be allowed, that Children have no less Reason to expect that some fixed Bounds should be set to this indefinite Authority.

IN what Manner then may Civil Society, supposing it to act on the truest principles of Liberty, proceed with Regard to these
general

general and opposite Pretensions? May it not fairly do as it does in other like Cases? May it not settle by some general Rule, and in such a Manner as seems to it most conducive to the Public Good, these indeterminate and seemingly inconsistent Claims? May it not fix a precise Time, in which *each* of them shall entirely give Place to the *other*? May it not *absolutely* fix this precise Time by refusing to *authorize* any Acts contrary to this it's Determination? And provided that in this Instance it restrains the Power of contracting in Children no longer than it does in all other Cases, where Fraud and notorious Indiscretion are in like Manner to be guarded against, can it justly be censured as exceeding, or even abusing it's Authority?

BUT our Author has an Objection to every such Law, which appears to him to be unanswerable. It must be fundamentally inconsistent with the Principles of Civil Liberty, because the supposed Minors can never *presumed* to *consent* to it *. And may it not as justly be said on the other Hand, that the Parent cannot be *presumed* to have given up so large a Share of his natural Power, as he has done by entering into Society, without some such Equivalent for it?

* p. 32.

Has he, even in this particular Case, no Sort of Claim to Authority arising from his Situation and Circumstances? And cannot a State be so constituted, as to have very important political Reasons for favouring and supporting these his Pretensions? Why then is this Affair *solely* to rest on the supposed *Consent* or *Dissent* of the Minor, without the least Regard to any of the abovementioned Considerations? It *cannot* do so on any possible Supposition, except on the extravagant one so frequently inculcated by this Writer, that the Moment a Child fancies itself capable of contracting Marriage, it has a natural, indefeasible, and invariable Right of blindly disposing of it's Person and whole Fortunes for Life, before it can by any other Method make even a temporary Disposition of perhaps a thousandth Part of them.

IN short, when once this strange unheard of Conceit is set aside, the State of the Case is plainly this. The Law under Consideration is merely an Attempt to adjust, as precisely and authoritatively as may be, two opposite and naturally indeterminate Pretensions. And the supposed Dissent of *one* of the Parties concerned, can no more invalidate such a Law, than it can in other Cases affect the judicial Sentence of a Magistrate. It is indeed far less capable of doing so in this Instance.

Instance. Since the Legislative Authority as such is evidently invested with a discretionary Power of regulating all these indeterminate Pretensions, not merely according to the particular Nature of them, but as directed likewise by general Maxims of public Utility and Convenience.

BUT why is the Dissent of the Minor to be *presumed* on this Occasion? Because, according to this Writer, in entering into Society he *must* be understood, as having *reserved* to himself his *natural* Right to contract Marriage, and cannot therefore consent, that, in Case he shall find it proper to make Use of this *Right*, he and his Family should undergo any considerable *civil* Inconveniencies, for want of a *civil* Confirmation of the Exercise of this his *reserved* Right. ‘ And you may as well tell me, ‘ says our Author, that when a Man has ‘ reserved to himself (as every Man must) ‘ his natural Right to chuse his Religion, ‘ and to worship God according to his own ‘ Judgment and Conscience, *his Consent* ‘ may nevertheless be *presumed* to a Law, ‘ which will expose him to Banishment, ‘ Confiscation, or any other Species of Persecution, in Case he should not think it ‘ reasonable to comply with the Religion ‘ of

‘ of his Country *.’ This Objection will, it must be owned, be somewhat formidable, whenever it shall be clear, that a Child, before it is *in general* supposed to be arrived at the Age of Discretion, in Case it fancies itself capable of chusing a Partner for Life, has an immediate Right to do so, a Right as unalienable, and incapable of being overruled by Civil Laws, as is that of a Person supposed to be arrived at the full Use of his Reason in the Choice of his Religion, *viz.* in an Affair, which of all others is the most *personal*, the most a Matter of *absolute* Duty, the most abhorrent of Compulsion, and the least capable of receiving any real Benefit, even from the most *wholesome* Severities that can be devised for it. Till however this new and extraordinary Hypothesis is fully established, the Child’s Consent to restrain itself from entering unadvisedly into the Marriage Contract, before it is come to the Age of Discretion, may as fairly, and for the same general Reasons be *presumed*, as it is with Regard to all other important Contracts whatever. And surely a reasonable Child under a reasonable Parent, before the Time, nay, before the Fit of amorous Fondness comes on, would,

on a just Representation of the Dangers arising from such blind Fondnesses, consent to put the Care of itself in that respect into the Parent's Hands ; or however would be unwise in not doing so, and therefore, by this Writer's own Rule must be presumed to consent.

BUT the Author would be content to wave this Point, if he could discover the Connection which any such regulations can possibly have with the public good. ' They help indeed to save Estates in private Families. But how is the Public concerned with this ? What one Family loses, another gets, who may be as useful Members of Society *.' Perhaps the Writer is not aware how *extensive* this kind of Reasoning is. If a Minor idly squanders away his whole Fortune, before he is of Age, what *he* loses, *another* gets, who may be as useful a Member of Society. And yet all civilized Nations have considered this as a public Mischief. Laws have almost every where been made against it ; though a Minor, who fancies himself arrived at the full Use of his Reason, may think them perhaps as hard as this now under Considera-

* P. 37.

tion. All regular Methods likewise of preventing a rash, hasty, and unadvised Alienation of Property, are, in effect, so many additional *Securities* to it. Now this Security is apparently the great Object of Civil Society, and the principal Foundation of all it's various Restraints on our natural Liberty. Wherever there is Reason to suspect any great Degree of Weakness or Folly on the one Hand, the Law very justly suspects that there must be Room for an equal Degree of Fraud and Knavery on the other. And effectually to discourage and defeat all Attempts of this Kind in any given Case, is visibly for the public Good. It is likewise in this Instance the more visibly for the public Good to defeat all such Attempts, in Proportion as they frequently are, not mere detached occasional Endeavours, but the Result of a regular Application to a formal System of Knavery, which it certainly cannot be for the public Good to encourage or connive at. Effectually moreover to free all Parents (especially those whose Children, during the Course of their Education, must frequently be at a Distance) from all Apprehension of their being inveigled, and perhaps ruined for Life; to prevent likewise great Uneasiness and Inconveniencies in whole Families, must surely

surely be deemed conducive to the public Good, unless the Happiness of Society be something different from that of the several Individuals which compose it. And how deservedly soever Love-Matches, as they are stiled, when made between Persons, whose Rank in Life and Course of Education are not totally opposite, and when entered into after some little Observation and Knowledge of the World, and after a proper Insight into the Turn and Disposition of each other; how deservedly soever such Marriages, when made with the utmost Freedom, may be esteemed the happiest, they cannot with any tolerable Degree of Fairness be confounded with those, which it is the Design of this Law to prevent. Even at best, in such Instances where there may be a mutual Passion between the Parties, there must, generally speaking, (if it be absolutely disapproved by the Parents) be Room to suspect something extremely wrong and imprudent in it, unless Children at seventeen or eighteen can fairly be presumed to be ordinarily wiser than their best Friends at forty or fifty. And common Observation too frequently justifies this Suspicion. A wanton idle Spirit of Dissipation, in Case the Parties have any Thing to spend, is the usual Attendant on these inflamed

inflamed and indulged Passions, this premature and thoughtless Attempt to settle in Life, and Impatience of Restraint in one of the most hazardous and important Concerns of it. All farther Improvement in the Knowledge of any lucrative Business or Profession, for which one of the Parties was perhaps destined, is irretrievably neglected. And absolute Ruin and Misery are the natural Consequence of this precipitate and obstinate Pursuit of imaginary Happiness. But the Case, even at first setting out, is often infinitely worse. The supposed generous Passion is entirely on *one* Side. On the other, mere mercenary Pretence, and deliberate Fraud and Imposture. The Villainy is no sooner compleated, but the Mask is impudently thrown off. A mutual and implacable Hatred succeeds. And this unhappy Conjunction of Knavery and Folly too often terminates in Separation, Adultery, Divorce, and Infamy.

BUT these Considerations extend beyond the immediate Subject of our present Enquiry. It is sufficient to have proved in general, that Minors, in respect of Marriage, as well as of other Contracts, cannot fairly be deemed so far Masters of themselves, as not to need some extraordinary

dinary and effectual Restraints; nor, on the other Hand, such absolute Slaves to mere animal Passion, as to be incapable of properly submitting to them. Our Author, somewhat inconsistently, seems at different Times to incline to each of these Extremes. But the plain Truth evidently lies between them.

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